STATE OF MICHIGAN

COURT OF APPEALS

GRAFF TRUCK CENTERS, INC.,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
February 6, 2007

No. 271361
Genesee Circuit Court
LC No. 05-082239-CK

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order granting summary disposition to plaintiff. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

Defendant city awarded plaintiff Graff a contract for several dump trucks, most outfitted with snow-removal equipment, but then on October 6, 2004, the city rescinded. Having acquired the customized inventory, Graff sold the trucks to other municipalities, recouping approximately seventy-five percent of the original purchase price. When Graff sued to recover the difference from the city, the city initially denied liability, but later withdrew its defenses and merely argued that Graff had failed to mitigate its damages.

Graff moved the trial court for summary disposition in accordance with MCR 2.116(C)(9) (failure to state a valid defense) and (10) (failure to provide evidentiary support). After hearing arguments, the trial court, without elaboration, ruled, "I don't think I have enough for an issue of fact. I'm granting [plaintiff's] motion in all respects."

The parties do not dispute that the city breached the contract or that Graff sold the customized trucks for substantially less than the contract price. Instead, the city argues that the trial court erred in granting summary disposition without taking evidence on whether plaintiff properly mitigated damages. See *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). Graff sought relief in accordance with ordinary contract principles and also the Michigan Uniform Commercial Code (UCC), MCL 440.1101 *et. seq*. The city admits that it bears the burden of proving Graff's failure to mitigate damages for purposes of its ordinary contract claim, but argues that, under the UCC, Graff bears the burden of showing that it acted in a commercially reasonable manner. In this case, however, the city's argument presents a distinction without a difference. The circumstances surrounding the secondary sale of the trucks were not materially disputed, and the city relies on Graff's evidence to support all of its

arguments regarding proper mitigation. According to MCL 440.2706(1), in response to a wrongful rejection, or revocation of acceptance, "the seller may resell the goods concerned," and "[w]here the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages . . . , but less expenses saved in consequence of the buyer's breach." Because the material facts were not in dispute, the trial court was required to "render judgment without delay," no matter which party prevailed. MCR 2.116(I)(1).

To avoid the judgment award Graff requested, the city was required to demonstrate that the undisputed facts did not justify awarding Graff its claimed damages, but instead revealed that Graff exercised bad faith or commercial unreasonableness in selling the trucks. However, the undisputed facts demonstrate that the market for the trucks was limited, that Graff advertised directly to these markets, and that buyers in these markets were prompted into buying the trucks more by the bargain prices than by the immediate need for the customized trucks. To support its argument of bad faith and commercial unreasonableness, the city points only to Graff's two-month delay in advertising the trucks, its mention of "special pricing" in its advertising, and the final sale prices. The city emphasizes that Graff delayed advertising the snowplowing trucks until December, and that they would have been more sellable earlier in the snowy season. However, the city failed to offer any basis, beyond conjecture, that would support its claim that the delay represented bad faith or commercial unreasonableness. In contrast, Graff's records demonstrate that it temporarily held the trucks to provide the city with an opportunity to retract its rescission. Moreover, the city failed to present any evidence or expert averment indicating that Graff would have received a substantially better price if it had advertised sooner, or that the delay was commercially unreasonable for any purpose.[1]

The trial court noted that the final selling prices were close enough to the original prices that "[t]his isn't exactly like kicking it out the backdoor." When the court asked defense counsel for "how much lower do you think they sold the vehicles . . . than they should have," defense counsel merely deferred to an eventual factfinder. When the court reminded defense counsel that Graff potentially remained liable for expenses in acquiring the trucks, defense counsel admitted that she was "not in a position to . . . argue or concede that [Graff was] in a position where [Graff] had to sell" the trucks to relieve financial pressure from creditors or insurers.

In short, the city had no specific basis for asserting that Graff accepted unreasonably low prices for the subject trucks. It merely speculated that the delay in advertising them, their

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[1] To demonstrate commercial unreasonableness in the sense of MCL 440.2706(1), a rescinding party must show more than the seller's mere failure to gain the optimal economic advantage or to devote extraordinary resources to locating the perfect, desperate and wealthy, buyer. In a private sale, it is enough that the course taken was commercially reasonable, i.e. that the advertising, if any, and the final asking price were justifiable under the circumstances. The circumstances were not disputed in this case, and they suggested that Graff's course of conduct was more than justified. Graff could have reasonably dropped its prices even farther if it had met with a shrewder bunch of municipalities, and could have excused an even longer delay if it genuinely felt that the city would soon revoke its rescission. See MCL 440.2611.

advertisement as "specially priced,"[2] and their sale for less than the original contract price reflected a commercially unreasonable approach to the resale. The city offered no evidence indicating that, if the sale were conducted as recommended, the purchasing municipalities would have paid a significantly higher price for any of the customized inventory.[3] Nor did it demonstrate that Graff acted out of spite or any other bad-faith impulse rather than a desire to protect its own financial interests. Because Graff presented strong evidence that its resale of the trucks were good-faith attempts to preserve its financial interests in a commercially reasonable manner, it was incumbent on the city to present contrary evidence to demonstrate bad faith or commercial unreasonableness. It did not. Viewing the undisputed facts in the city's favor, the city failed to support any of its allegations of bad faith or commercial unreasonableness, and a trial on these issues could only invite unjustified speculation. See *Skinner v Square D Co*, 445 Mich 153, 174-175; 516 NW2d 475 (1994). Under the circumstances, the trial court properly resolved the issue in Graff's favor and entered judgment without trial. MCR 2.116(I)(1).

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis

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[2] We regard the advertising of special pricing as too familiar a tactic for catching a potential customer's eye to evince a seller's intention to sell for a commercially unreasonable price. If Graff had failed to advertise that the trucks were a bargain, the city could argue that Graff ran up its storage, insurance, and other incidental costs by failing to sell the trucks quickly. As it is, the city complains that the short time between the city's rescission and Graff's advertisement of the trucks was inordinately and prejudicially long.

[3] We note that at least one of the cities was enticed by the special pricing to respond quickly, so the city fails to demonstrate how offering a lower price was itself an indication of commercial unreasonableness, but the holding and storing of the costly and quickly depreciating goods even farther into the snowy season would have been a sensible and unobjectionable alternative.